

**In The  
Supreme Court of Ohio**

**STATE EX REL. SHAWN WEILER,**

*Relator,*

v.

**FRANK LAROSE,**

*Respondent.*

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Case No. 2023-1525

Original Action in Mandamus

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**RESPONDENT FRANK LAROSE’S COMBINED MOTION TO DISMISS AND  
OPPOSITION TO RELATOR’S EMERGENCY MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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SHAWN WEILER  
P.O. Box 470363  
Broadview Heights, Ohio 44147  
skweiler@gmail.com

*Relator, pro se*

DAVE YOST (0056290)  
Ohio Attorney General

STEPHEN P. TABATOWSKI (0099175)  
ANN YACKSHAW (0090623)\*  
*\*Counsel of Record*  
MICHAEL A. WALTON (0092201)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215  
Tel: 614-466-2872 | Fax: 614-728-7592  
Ann.Yackshaw@OhioAGO.gov  
Michael.Walton@OhioAGO.gov  
Stephen.Tabatowski@OhioAGO.gov

*Counsel for Respondent*

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Pursuant to Civ.R. 12, Respondent Frank LaRose hereby moves this Court to dismiss Relator’s Complaint. Relator fails to support his Complaint with an affidavit based upon personal knowledge, and the Complaint should be dismissed on this basis alone. Moreover, this Court lacks jurisdiction over the injunctive relief requested in Relator’s Complaint. Finally, Relator fails to set forth a valid claim in mandamus. Consequently, his Complaint should be dismissed and, for the same reasons, his Motion for Temporary Restraining Order and Preliminary Injunction should be denied. A memorandum in support is attached.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

/s/ Stephen P. Tabatowski

STEPHEN P. TABATOWSKI (0099175)

ANN YACKSHAW (0090623)\*  
\*Counsel of Record  
MICHAEL A. WALTON (0092201)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
Tel: 614-466-2872 | Fax: 614-728-7592  
Ann.Yackshaw@OhioAGO.gov  
Michael.Walton@OhioAGO.gov  
Stephen.Tabatowski@OhioAGO.gov

*Counsel for Respondent*

## **MEMORANDUM**

### **I. INTRODUCTION**

Relator's Complaint should be dismissed. Relator asks this Court to grant him an extraordinary writ of mandamus ordering Respondent Frank LaRose ("Secretary LaRose") to "either refuse to certify or decertify the elections results with regards to" the passage of State Issue 1 at the recent November 7, 2023 election. He has further filed a Motion for Temporary Restraining Order and Preliminary Injunction requesting that Secretary LaRose be enjoined from certifying those results. But Relator's Complaint suffers from a number of fatal defects that require its dismissal, and his Motion must be denied for those same reasons.

First, Relator did not support his Complaint with the mandatory affidavit based on personal knowledge that is required by R.C. 2731.04 and S.Ct.Prac.R. 12.02(B)(1)-(2). This procedural defect alone requires dismissal. Second, Relator's Complaint and requested relief manifestly amount to an action for declaratory judgment and prohibitory injunction, over which this Court lacks original jurisdiction. Finally, Relator fails to set forth a valid claim in mandamus because he cannot establish a clear legal right to prevent Secretary LaRose from certifying election results, nor does Secretary LaRose have a clear legal duty to provide that relief.

For these reasons, Relator's Motion for Temporary Restraining Order and Preliminary Injunction should be denied, and his Complaint should be dismissed.

### **II. BACKGROUND**

Relator alleges that "[o]n November 7th, 2023 A. D., the electors in the state of Ohio voted on an unjust law in the form of a proposed amendment to the Ohio Constitution entitled State Issue 1: A Self-Executing Amendment Relating to Abortion and Other Reproductive Decisions ('Amendment')." Compl., ¶ 18. Relator claims that "[a]t some point in the future," Secretary LaRose "will certify the result of this election." *Id.*, ¶ 21. He further alleges that Secretary LaRose

“does not know that the Amendment was unconstitutional” and that “it wasn’t within the lawful power of the people to propose it.” *Id.*, ¶¶ 22, 24. He claims he “has the legal right to the equal protection of the laws, especially with regards to the inalienable right to life and the defense of life.” *Id.*, ¶ 27. He requests a writ of mandamus “mandating that [Secretary LaRose] shall either refuse to certify or decertify the election results with regards to the Amendment.” *Id.*, Prayer for Relief.

Relator further filed an “Emergency Motion for Temporary Restraining Order and Preliminary Injunction.” *See generally* Rel. Mot. In his motion, Relator moved the Court “to enter an Order enjoining Frank LaRose from certifying the election results for the ballot initiative submitted to the electors under the designation of State Issue 1 for the November 7th, 2023 general election.” *Id.* at 1.

### **III. LAW AND ARGUMENT**

#### **A. Standard of Review**

A motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted challenges the sufficiency of the complaint itself, not any evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering a Civ.R. 12(B)(6) motion, a court must accept the factual allegations of the complaint as true and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). However, a court “need not presume the truth of conclusions unsupported by factual allegations.” *Welch v. Finlay Fine Jewelry Corp.*, 10th Dist. Franklin No. 01AP-508, 2002 Ohio App. LEXIS 503, at \*5 (Feb. 12, 2002). Moreover, “unsupported legal conclusions are not entitled to any presumption of truth and are not sufficient to survive a motion to dismiss.” *Maternal Grandmother*,

*ADMR v. Hamilton Cty. Dept. of Job & Family Servs.*, 167 Ohio St.3d 390, 2021-Ohio-4096, ¶ 29. When a relator fails to meet his burden, dismissal under Civ.R. 12(B)(6) is required.

**B. Relator’s Complaint is not supported by an affidavit based on personal knowledge.**

Procedurally, Relator’s Complaint fails to meet the statutory and this Court’s requirements for a writ of mandamus as set forth in R.C. 2731.04 and S.Ct.Prac.R. 12.02(B)(1)-(2). The statute requires that the petition *must* be “verified by affidavit.” R.C. 2731.04. The Ohio Supreme Court Rules of Practice require original actions to “be supported by an affidavit specifying the details of the claim,” which “shall be made on *personal knowledge*, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit.” (Emphasis added.) S.Ct.Prac.R. 12.02(B). An original action *must* be supported by an affidavit. *State ex rel. Maras v. LaRose*, 168 Ohio St.3d 430, 2022-Ohio-3295, 199 N.E.3d 532 ¶ 16; *see State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 2001-Ohio-1606, 756 N.E.2d 1228 (2001) (holding a mandamus complaint not supported by an affidavit is defective and subject to dismissal). This Court has “[r]outinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant’s personal knowledge.” *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 31, quoting *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, ¶ 24.

Here, Relator fails to include an affidavit stating the facts in his Complaint were based on his personal knowledge. *See generally* Compl. Because Relator failed to include a supporting affidavit, his Complaint should be dismissed.

**C. The Court lacks original jurisdiction to grant a declaratory judgment or prohibitory injunctive relief.**

Relator's Complaint fails for another reason: The Court does not have jurisdiction in mandamus to grant a declaratory judgment or prohibitory injunctive relief. This is also fatal to Relator's Motion for Temporary Restraining Order and Preliminary Injunction.

The Ohio Constitution vests the Supreme Court of Ohio with original jurisdiction over five extraordinary writs: habeas corpus, mandamus, procedendo, prohibition, and quo warranto. Ohio Constitution, Article IV, Section 2(B)(1). "It is axiomatic that 'if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.'" *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 13, quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999).

Here, Relator alleges that the Amendment is unconstitutional and that "at some point in the future," Secretary LaRose will certify the results of the election. Compl., ¶¶ 18-22. He demands that the Court issue a writ of mandamus ordering Secretary LaRose to "either refuse to certify or decertify the elections results with regards to the Amendment." *Id.*, Prayer for Relief. In his Motion for Temporary Restraining Order and Preliminary Injunction, Relator makes clear he seeks "an Order *enjoining Frank LaRose from certifying* the election results for" the Amendment. Rel. Mot. at 1 (emphasis added).

The allegations of Relator's Complaint and his requested injunctive relief make clear that, here, "the real object[] sought" is a prohibitory injunction preventing certification of the election results and ultimately preventing the Amendment from taking effect—which the Court lacks jurisdiction to consider. *State ex rel. Obojski* at ¶ 13. To the extent Relator seeks a declaration that

the Amendment is somehow unconstitutional, the Court similarly “has no jurisdiction to entertain” requests for declaratory judgments “except in regard to apportionment matters, where its jurisdiction is exclusive and original.” *State ex rel. Governor v. Taft*, 71 Ohio St.3d 1, 5, 640 N.E.2d 1136 (1994). Accordingly, Relator’s Complaint “does not state a cause of action in mandamus but states a cause of action in injunction” and accordingly it “must be dismissed for want of jurisdiction.” *Id.* For the same reasons, his Motion for Temporary Restraining Order and Preliminary Injunction—in which he patently seeks prohibitory injunctive relief—must be denied.

**D. Relator fails to state a claim in mandamus.**

Relator’s Complaint must also be dismissed because he fails to state a claim in mandamus. In order for a writ of mandamus to issue, Relator has the burden of establishing that: (1) he has a clear legal right to the requested relief; (2) Secretary LaRose has a clear legal duty to provide the requested relief; and (3) Relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951. In seeking a writ of mandamus, Relator must prove that he is entitled to the writ by clear and convincing evidence. *State ex rel. Ward v. Reed*, 141 Ohio St.3d 50, 2014-Ohio-4512, 21 N.E.3d 303. Relator cannot establish any of the foregoing elements.

First, Relator has not identified any authority that gives him a clear legal right to his requested relief. In his Complaint, Relator summarily alleges that he “has the legal right to the equal protection of the laws, especially with regards to the inalienable right to life and the defense of life.” Compl., ¶ 27. Relator does not (and cannot) allege how his right to equal protection establishes a clear legal right to an order mandating Secretary LaRose to “either refuse to certify or decertify the election results with regards to the Amendment.” *Id.*, Prayer for Relief. Indeed, Relator’s Complaint includes no allegations as to how his rights to equal protection were even violated aside from general allegations about the the passage of an Amendment he believes is



unconstitutional. Because Relator has failed to identify any source supplying him with a clear legal right to prevent Secretary LaRose from certifying the results of the election or to have those results “decertified,” his mandamus claim fails.

Second, Relator has not identified a clear legal duty on Secretary LaRose’s part to refuse to certify the election results or to decertify them. In fact, Secretary LaRose has a clear legal duty to follow the strictures of R.C. 3505.35 (cited by Relator in his Complaint): i.e., to canvass the abstracts of results from each county and to determine and declare the results of the election. There are no allegations in the Complaint that Secretary LaRose failed to do so. To the extent Relator claims the Amendment is unconstitutional, “[t]he Secretary of State is an executive officer who is not vested with any jurisdiction to determine judicial questions dealing with the constitutionality of any law.” *Maloney v. Rhodes*, 45 Ohio St.2d 319, 345 N.E.2d 407 (1976), paragraph 2 of the syllabus. Instead, the Secretary has the ministerial duties set forth in R.C. 3505.35. Relator makes no factual allegations as to how Secretary LaRose failed to carry out his statutory duties. Accordingly, he has failed to establish a clear legal duty of Secretary LaRose to not certify or decertify the results of the election. His Complaint should be dismissed.

#### **IV. CONCLUSION**

For the foregoing reasons, Secretary LaRose respectfully asks this Court to deny Relator’s Motion for Temporary Restraining Order and Preliminary Injunction, and to dismiss Relator’s Complaint in its entirety.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

/s/ Stephen P. Tabatowski

STEPHEN P. TABATOWSKI (0099175)

ANN YACKSHAW (0090623)\*

\*Counsel of Record

MICHAEL A. WALTON (0092201)

Assistant Attorneys General

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Tel: 614-466-2872 | Fax: 614-728-7592

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Michael.Walton@OhioAGO.gov

Stephen.Tabatowski@OhioAGO.gov

*Counsel for Respondent Frank LaRose*

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 28, 2023, the foregoing was filed electronically using the Court's e-filing system. I further certify that the foregoing was served by electronic mail upon the following:

Shawn Weiler  
skweiler@gmail.com

*Relator, pro se*

/s/ Stephen P. Tabatowski

STEPHEN P. TABATOWSKI (0099175)

Assistant Attorney General